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Supreme Court of the United States

OCTOBER TERM, 1943

No. 523

MIDDLETON & COMPANY (CANADA) LTD., *et al.*,
Petitioners,

against

OCEAN DOMINION STEAMSHIP CORPORATION,
Respondent.

(Consolidated Cause)

BRIEF ON BEHALF OF OCEAN DOMINION STEAMSHIP CORPORATION, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Proceedings in the District Court and in the Circuit Court of Appeals

These are admiralty causes brought by consignees or other persons interested in the cargo of the small Norwegian steamer Iristo, which stranded on a coral reef off the north coast of Bermuda on March 15, 1937, at about 3:00 P. M., and a few hours later became a total loss while being towed to port. The Iristo carried no passengers, and her crew sustained no injuries.

The respondent, Ocean Dominion Steamship Corporation, was not the owner of the Iristo. It was merely a *sub-time-charterer* (R. 706-707). The Iristo had on October 5, 1936, been time-chartered by her Norwegian owners to the Atlantic Maritime Corporation and, while this charter

was still in force and effect, the Atlantic Maritime Corporation had sub-time-chartered the vessel for "about six calendar weeks" to respondent (R. 148, 160). Neither of these charters was a demise (R. 155, 167) and the master and crew remained throughout in the service of the Norwegian owner.

Nevertheless, the libelants (now petitioners), who are almost entirely of Canadian or British nationality (R. 19-22, 80-81, 112-114), sought to fix liability upon the respondent, on the tenuous theory that it was the "carrier" of the merchandise, despite the fact that it was not the owner of the ship nor the employer of the master and crew.

After weighing all the evidence in this record of over 750 pages and in the many exhibits separately reproduced, the District Court dismissed the libels because of its two separate and distinct findings of fact:

(1) that the respondent was neither the carrier nor liable under the bills of lading (R. 686-698);

(2) that, *even if the respondent had been the carrier,* it would not have been liable, because the Iristo was seaworthy and due diligence had been exercised to make her so, and the loss was due to the "act, neglect or default of the master, mariner, pilot or servants of the carrier in the navigation or in the management of the ship" (R. 698-705), for which the carrier is not liable under the provisions of the Canadian Water Carriage of Goods Act, which is *admittedly applicable* (see petition, p. 9).

The District Court's opinion is at R. 686-705 and its findings of fact and conclusions of law at R. 705-721.

The essential *findings of fact* of the District Court are (R. 719):

> "34. On the voyage herein referred to, the 'Iristo' was seaworthy and due diligence had been exercised to make her seaworthy.
>
> 35. The respondent is not liable herein as a carrier."

The Circuit Court of Appeals said (R. 757-758):

"The District Court found that the Iristo was seaworthy and determined that the loss resulted from an act, neglect, or default in the navigation or management of the ship for which there was no liability on the part of the carrier or the ship under Art. IV 2(a) of the Rules annexed to the Canadian Water Carriage of Goods Act. It dismissed the libels for this reason and also for the reason that the bills of lading were contracts of carriage between the shipper and the shipowner and not contracts of carriage by the subcharterer, who is the respondent in this suit. Inasmuch as we are persuaded that the libellants must fail for the first reason, that is to say, because the Iristo was seaworthy, it becomes unnecessary to decide whether the respondent was the carrier, or was a mere agent of the shipowner who incurred no personal obligation for the loss.

The cargo of the Iristo was carried under the Canadian Water Carriage of Goods Act of 1936 which, in Article IV, provides as follows:

'1. Neither the carrier nor the ship shall be liable for loss or damage arising from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, * * *

Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship; * * *'

We hold that the Iristo was properly found seaworthy because of the notices on board which disclosed the existence and location of the wreck and that the failure to bring the chart down to date, or otherwise to use the information available, when navigating in

> the vicinity of Bermuda, was a fault 'in navigation or management.' This very point was involved and passed upon by the present court in *United States Steel Products Co.* v. *American & Foreign Ins. Co.*, 82 F. (2d) 752. There the 'Steel Scientist' was found seaworthy, in spite of the fact that her charts had not been brought up to date, because there were records on board from which they could be readily corrected before the vessel reached the waters in which the information became necessary for proper navigation. It would seem equally foolish to hold a ship unseaworthy because her master employed a chart that had not been brought up to date, when he had a correct chart on board that he had forgotten to use, and to hold the Iristo unseaworthy because her officers employed a deficient chart when the means to correct it in good season were available."

There are thus concurrent findings (without any dissent) that the Iristo was seaworthy and that the loss was due to "act, neglect or default * * * in navigation or management". This is admitted in the petition, p. 3.

It is elementary, of course, that this Court will not review concurrent findings of fact of the lower courts.

> *Page* v. *Arkansas Gas Corp.*, 286 U. S. 269, 271;
> *The Wildcroft*, 201 U. S. 378, 387 (seaworthiness held question of fact);
> *Luckenbach* v. *W. J. McCahan Sugar Ref. Co.*, 248 U. S. 139, 145 (seaworthiness *vel non* a question of fact).

The findings above referred to of seaworthiness and due diligence are findings of *ultimate facts, Merchants' Ins. Co.* v. *Allen*, 121 U. S. 67, and necessarily required the dismissal of the libel. Petitioners do not claim to be entitled to succeed if these concurrent findings of the lower courts stand; they ask this Court to set them aside.

The Events Leading Up to the Stranding

To show the fallacies in petitioners' contentions, a brief summary of the events leading up to the stranding is required.

On December 23, 1936, the U. S. Hydrographic Office issued a "Notice to Mariners" No. 52 of 1936, reading as follows (R. 654, 655):

> "(3643) BERMUDA ISLANDS — North Rock Light — Wreck northeastward. — The wreck of a vessel, which is conspicuous, lies stranded 2.57 miles 77° from North Rock Light.
>
> Approx. position: 32° 29′ N., 64° 43′ W. (N.M. 52, 1936). (Notice to Mariners 48 (2325), Admiralty, London, 1936.) * * *"

Neither this notice nor any publication of any Hydrographic Office identified the "wreck" as the Cristobal Colon (R. 656-657). This notice in stating that the wreck was "conspicuous" was *more informative* than the wreck symbol which would have been found on Chart No. 360 had the latter been corrected up to date when purchased. (The symbol appears on Exhibit F, R. 674.)

The master of the Iristo had on board *two* copies of the above referred to "Notice to Mariners", the first obtained at Boston on February 13, 1937, and the second at Philadelphia on March 3, 1937 (R. 741-742), *only twelve days prior to the stranding.* The petition is wholly inaccurate in stating (p. 7) that these notices were secured "some months" before the arrival of the Iristo at Halifax.

It is the common practice of ship's officers to make use of the "Notices to Mariners" to bring the ship's charts down to date. This practice is referred to by the Circuit Court of Appeals as "the routine labor of examining mariners' notices so as to bring navigation charts up to date" (R. 758).

On arrival at Halifax, the first loading port, on March 8, 1937, the master sought to purchase British Admiralty Chart No. 335, a large scale chart of the Eastern section of Bermuda (R. 457, 458, 716). Chart No. 335 was out of stock, and he was offered British Admiralty Chart No. 360, a chart of the whole island (R. 457). The master indicated a preference for chart No. 335, and stated he would try to obtain No. 335 at St. John, N. B., his next port of call (R. 458, 716).

The Iristo arrived at St. John on March 10, 1937, and the master there purchased from the official sub-agent for Admiralty charts chart No. 360, chart No. 335 not being available (R. 716-717). The British Admiralty instructs its sub-agents to see that the charts in their possession are kept up-to-date and sends them Notices to Mariners for that specific purpose (R. 461, 478-479). In the present instance, that duty seems not to have been performed, as the chart sold the master of the Iristo (Exhibit X) does not bear any reference to the "wreck".

The Iristo sailed from St. John on March 11th with ample equipment for navigational purposes, if that equipment were properly used. This included wireless by which communication could be had and bearings could be obtained from shore stations (R. 520, 563), a patent log which had been carefully checked (R. 560), a number of nautical publications giving particulars as to lights, tides, sailing directions, etc. (R. 552), British Admiralty Chart No. 360 and two copies of Notices to Mariners No. 52 of 1936, which made reference to the "wreck" and stated its exact location, *supra*, p. 5, R. 717.

After an uneventful voyage, the Iristo began to near Bermuda on March 15th.

At noon on that day, chart No. 360 was placed on the chart table and used for navigation (R. 608, 714-715). After ascertaining the ship's position, the master and chief officer laid off a course of 100° true, which they calculated would take the Iristo about three miles to the northward

of North Rock Light, which lies on the reef off the north coast of Bermuda (R. 559, 715).

At 12:30 P. M., Lunderbye, the second mate, relieved the first mate who went off watch (R. 503-504). The master was then in charge of the navigation, visiting the navigating bridge as occasion required (R. 540, 559). While the weather was slightly misty, the visibility remained good (R. 556).

On the Iristo's nearing North Rock Light, the master directed the second mate to take a bow and beam ("four point") bearing of the light to ascertain the approximate distance of the Iristo therefrom (R. 715). The light was abeam of the Iristo at 2:50 P. M. (R. 505) and after taking the bearing the mate assumed the Iristo to be 1½ miles distant from the light (R. 715), and ordered the helmsman to alter the course 15° to the northward to 85° true (R. 506). Immediately thereafter the master, believing that he saw a steamer (in fact the wreck of the Cristobal Colon) a little on his starboard bow, changed the Iristo's course sharply to starboard, which was toward the reefs (R. 561). Had the master consulted the chart, he must have realized that this maneuver would put the ship ashore (R. 421).

The Iristo stranded at 3:00 P. M. (R. 715). As she could not be released by her own efforts, a wireless was sent for a tug, which arrived at 6:00 P. M. (R. 512). She was then floated from the reef but sank while being towed to port (R. 512-513).

FIRST POINT

The lower courts correctly found that the Iristo was seaworthy, that due diligence had been exercised to make her so, and that the loss was due to causes for which there was no liability. These were questions of fact under both Canadian and American law and the findings are amply sustained by the evidence. Petitioners fail to show any sufficient reason for granting a writ of certiorari.

(a) Legal principles applied in the controlling foreign decisions.

As the case is admittedly governed by Canadian law (Petition, p. 9), it is obvious that the controlling decisions are those which would be considered binding precedents had the case been tried in a Canadian Court.

Canadian courts are bound by decisions of the Privy Council and also by decisions of the House of Lords because the House of Lords is the final authority as to the common law, *Robins* v. *National Trust Co.*, L. R. [1927] A. C. 515, 519 (R. 286).

By stipulation it was agreed that foreign decisions might be referred to (R. 147, 300), and the following were accordingly brought to the attention of the lower courts:

In *Steel* v. *State Line SS. Co.*, L. R. 3 A. C. 72, in the House of Lords, a ship had loaded a quantity of wheat which on arrival was found to have been damaged by seawater. The bill of lading did not modify the warranty of seaworthiness but provided that the ship should not be liable for perils of the seas, etc., even though due to negligence of the ship's company.

The jury returned a special verdict which stated, in substance, that through the negligence of some of the crew a port on the orlop deck was insufficiently fastened, with the result that water entered thereby some five days after the

ship was at sea, the port being about a foot above the water line when the ship was loaded.

Lord Blackburn, whose opinion has frequently been cited as authoritative, held that the question whether or not the ship was unseaworthy was *one of fact* and that except in an extreme case the decision of the jury, whether for plaintiff or defendant, would be determinative.

Lord Blackburn said (pp. 90, 91) that:

> "if in the inside the wheat had been piled up so high against it [the port] and covered it, so that no one would ever see whether it had been so left or not, and so that *if it had been found out or thought of*, it would have required a *great deal of time and trouble* (*time above all*) to remove the cargo to get at it and fasten it—if that was found to be the case, and it was found that at the time of sailing it was in that state, I can hardly imagine any jury finding anything else than that a ship which sailed in that state did not sail in a fit state to encounter such perils of the sea as are reasonably to be expected in crossing the Atlantic. I think, on the other hand, if this port had been, as a port in the cabin or some other place would often be, open, and when they were sailing out under the lee of the shore remaining open, but quite capable of being shut at a moment's notice as soon as the sea became in the least degree rough, and in case a regular storm came on capable of being closed with a dead light—in such a case as that no one could with any prospect of success, ask any reasonable people, whether they were a jury or Judges, to say that that made the vessel unfit to encounter the perils of the voyage, because that thing could be set right in a few minutes, * * *.
>
> * * * it will be a question, taking the whole circumstances together, was this ship reasonably fit when she sailed to encounter the perils, and was the damage that happened a consequence of her being unfit, if she was unfit. That question will have to be determined upon the whole circumstances and the whole of the evidence. *I have merely indicated two extreme cases which I think are quite possible,* and in one of which I think it is quite clear that nobody would say she was seaworthy; in the other case I think anyone would

> say she was seaworthy. *These are only two extreme cases—there must be plenty of room for dispute between the two.*" (Italics ours.)

Lord Blackburn states that time is the important factor and the correction in the present case could have been made in less than a minute (R. 408).

Applying the decision in *Steel* v. *State Line* (*supra*), the question as to whether or not the Iristo was seaworthy is one of fact which was decided in favor of the respondent by the District Court (Finding 34, R. 719) as a question of *fact* (Opinion, R. 704), and affirmed by the Circuit Court of Appeals on the same basis (R. 759).

The rule that any defect or deficiency which can be satisfactorily dealt with in the course of the voyage, and ordinarily is so dealt with, is not unseaworthiness, is well settled in the English courts. In *Arnould on Marine Insurance*, 12 Ed., at p. 967, it is said:

> "The fact that some precaution has been neglected at the time of sailing does not make the ship unseaworthy, if she be in such a state and so equipped that, if the master and crew do their duty, no extra danger will be incurred."

In *Ajum Goolam* v. *Union Marine Ins. Co.*, L. R. [1901] App. Cas. 362, it was held that a ship which capsized soon after sailing was not unseaworthy because of slack water in a tank which could have been pumped overboard on the voyage. The Privy Council said (p. 371):

> "Even if water in the tank might be a source of danger, the judgment of Lord Blackburn in *Steel* v. *State Line Steamship Co.* (3 App. Cas. 72) shews that a ship ought not to be treated as unseaworthy by reason of something objectionable, but easily curable by those on board."

In *Elder, Dempster & Co., Ltd.* v. *Paterson, Zochonis & Co.*, L. R. [1924] App. Cas. 522, the following rule was stated by Lord Sumner (pp. 558-559):

> "It appears to me to have been decided, that, even if the case of something which is a defect in the ship herself, structural or accidental, sufficient to render the ship unseaworthy if not properly handled or adjusted, though I can find no such defect here, it would be an answer to an allegation of unseaworthiness to show that, in the ordinary course of proper management, the ship so constructed, or the appliance so adjusted, will be restricted to its proper uses and prevented from being a source of danger."

In *Madras Electrical Supply Co.* v. *P. & O. Steam Navigation Co.*, 18 Ll. List L. R. 93 (Ct. of Appeal), Lord Justice Scrutton, the author of the well-known book on Charter-parties, said (pp. 97-98):

> "As I understand the authorities, a ship is not unseaworthy where the defect is such that it can be remedied on the spot and in a short time by materials available. The common case is a ship with an open port-hole. If the port-hole is in a place where you can shut it at once, a ship is not unseaworthy because her port-hole happens to be open. If the port-hole is in a place where you cannot get at it during the voyage, and it is open, then the ship is unseaworthy. In the same way, I absolutely decline to hold that a ship is unseaworthy because, there being the materials on board to be used for the purpose for which seaworthiness is required, the officers of the ship do not use the materials which are available."

In *Cunningham* v. *Colvils,* 16 Sess. Cas., 4th Series, 295, a steamer had sailed from Seville having filled her boiler with muddy water from the river. Some three days after sailing, heavy weather came on and the crowns of the wing furnaces in her boiler collapsed. As a consequence of inability to maintain steam pressure, she became a total loss.

The shipowners defended a suit brought by cargo on the ground that the muddy water could have been pumped overboard, so that the loss was not due to unseaworthiness but to "errors or negligence of navigation," for which the

shipowners were not liable. The engineers "did not know there was any mud in the boiler to the extent of being a source of danger" (p. 306).

The decision of the Court of Sessions was unanimous in favor of the shipowners. Lord Adam said (p. 305):

> "They (the shipowners) say that if the presence of the mud in the boiler constituted such an element of danger as to produce unseaworthiness if not removed, yet it could and ought to have been removed as soon as the vessel got to sea by blowing it out of the boiler and taking in sea water. This, they say, is a method quite simple and known to every engineer, and that if the vessel was lost by reason of the presence of the mud she was not lost because of unseaworthiness, but because of the error or negligence of the engineer in not blowing it out of the boiler. In my opinion the defenders are right in this contention, and it is supported by the principles laid down in the House of Lords in the case of *Steel & Craig*, 4 R. (H. L.) 103 (*Steel* v. *State Line*, 3 App. Cas. 72)."

Petitioners cite *Dobell & Co.* v. *s/s Rossmore Co.*, [1895] 2 Q. B. 408, a porthole case, where "there were no facilities for closing the porthole."

The ship's unseaworthiness was admitted (see the report in 8 Asp. M. C. N. S. 33), the defense being rested on other grounds.

Standard Oil Co. v. *Clan Line*, [1924] A. C. 100, and *The Schwan*, [1909] A. C. 450, cited by petitioners, are both cases of dangerous and unusual construction or equipment.

In *Standard Oil* v. *Clan Line, supra*, the vessel was of the unusual "turret" type of construction. A peculiar feature of the vessel was that she would capsize if her ballast tanks were pumped out when she was loaded with a homogenous cargo. Her owners had been warned of this by the builders, but failed to notify the master. He did not know of the danger, and had no means of ascertaining it.

In *The Schwan, supra*, the vessel was fitted with a so-called "three-way cock" of a dangerous and unusual construction [1909] A. C. at p. 463.

Unlike the chart (Exhibit X, R. 679), which was always open to view, there was no way in which the dangerous features of the "three-way cock" could be ascertained.

There was nothing "unusual, improper and dangerous" in the equipment of the Iristo. The chart No. 360 purchased at St. John was, it is true, not corrected up to date, but it is the ordinary practice to correct charts from Notices to Mariners during the voyage (R. 402, 613).

Standard Oil Co. v. *Clan Line, supra,* was distinguished by Lord Justice Scrutton in *Madras Electrical Supply Co.* v. *P. & O. S. N. Co., supra,* at page 98:

> "The master of a particular turret ship was not given instructions from the builders which would have told him very important facts as to the stability of the ship, and in consequence of not being told that, he pumped out his ballast tanks, with the result that the ship turned turtle. It seems to me to be an absolutely different case from a question of the ordinary lifting of heavy weights, which comes within every master's experience, and where the master in lifting a particular heavy weight does not use a rope which he had on board, but which he might have used."

The case at bar is parallel to the above. The correction of charts by Notices to Mariners comes within "every master's experience" and the master had on board a Notice to Mariners giving the information which he might have used.

Furthermore, the finding is in the case at bar that the owners had fully complied with all of their obligations (Findings 32, 33, R. 718, 719).

The *Clan Line* case, *supra,* was again distinguished in *Cosmopolitan Shipping Co.* v. *Hatton,* 35 Com. Cas. 113, as follows (pp. 131-132):

> "There are obviously cases where it is the duty of the owner to give his master specific instructions about some technical information the owner has upon some special point about the ship which a master could not be expected to know. An example of this is special information as to the stability of the ship, the failure

> to communicate which was held to be negligence of the owners in *Standard Oil Company* v. *Clan Line,* [1924] A. C. 100. But I cannot think it is necessary for an owner sending a certificated master of experience out on a voyage to give him detailed instructions in all the ordinary points of a master's duty, such as the condition of sails and the 'tightness and staunchness of the hull.' "

The correction of charts is one of the "ordinary points of a master's duty."

Again, in *Tempus Shipping Co.* v. *Louis Dreyfus & Co.,* [1931] 1 K. B. 195, the *Clan Line* case was distinguished on similar grounds (p. 204).

The Schwan, supra, was commented upon by Lord Sumner in *Elder, Dempster & Co.* v. *Paterson* ([1924] A. C. at 559), as follows:

> "The reasoning of your Lordships' House in *The Schwan,* [1909] A. C. 450, 463, shows that, assuming the three-way cock to have been an unfit contrivance in itself, the ship would nevertheless have been seaworthy, if those in charge *could in the ordinary course have seen its risks* and known how to meet them." (Italics ours.)

The navigators of the Iristo "could in the ordinary course have seen" that the chart bore no recent corrections, and then have examined the notices.

In *The Touraine,* [1928] P. D. 58, cargo was injured by leakage from a pipe which had been broken by one of the seamen, who had used an iron rod to clear the pipe of an obstruction. Mr. Justice Hill said (p. 67):

> "The question I have to ask myself is, I think, that indicated by Lord Gorell in *The Schwan* ([1909] A. C. 450, 463), and it is this: 'Was the vessel in respect of this pipe reasonably fit to be worked in the way which might ordinarily be expected?' I think it was. If so, then, in respect of the pipe the ship was not unseaworthy nor the strong room unfit or unsafe."

With an adequate chart and with Notices to Mariners on board, the Iristo was "reasonably fit to be worked in the way which might ordinarily be expected."

The Schwan, supra, was also distinguished by Hough, J., in *The Miguel de Larrinaga,* 217 Fed. 678, on the ground that the loss was due to the use of a "peculiar and new-fangled cock," and he held that there was no liability for cargo damage due to the officers' failure to use ordinary equipment readily available.

Petitioners also refer to *Foreman* v. *Federal S. N. Co.,* [1928] 2 K. B. 424; *Gosse Millerd* v. *Canadian Govt. Marine,* [1929] A. C. 223, and *Hourani* v. *Harrison,* 32 Com. Cas. 305. These last three decisions, however, did not deal with any question of seaworthiness, but only with whether the loss was due to act, neglect or default in management or navigation or to failure to care for the cargo. They are not in point here.

(b) To recover under the Canadian Act petitioners had to prove both that the Iristo was unseaworthy and that the unseaworthiness caused the loss (R. 207, 699, *Joseph Constantine S.S. Line* v. *Imperial Smelting Co.,* [1942] A. C. 154). Even had petitioners sustained this burden, which they did not, there would still be no liability because of the finding that due diligence was exercised (R. 719, 648-9). The American decisions cited by petitioners are inapplicable.

While the American decisions are not controlling, they will be found to support the position of the respondent.

A recent decision directly in point is *U. S. Steel Products Co.* v. *Amer. & For. Ins. Co., The Steel Scientist,* 11 Fed. Supp. 175, aff'd 82 F. (2d) 752, also referred to in petitioners' brief.

The Steel Scientist, on sailing from New York for the Panama Canal, obtained Notices to Mariners and other documents from which her charts could be corrected. The Notices to Mariners were not, however, used and the ship stranded because the chart in use did not indicate the

installation of a new lighthouse. It was held that the failure of the navigating officers to make use of the Notices to Mariners was an error in navigation and not unseaworthiness. The rule was thus stated in the District Court at page 180:

> "If an owner provides his vessel with the informative equipment, such as charts, Light Books, Supplements bringing them up to date, reasonably sufficient to conduct the safe navigation of the vessel, and the information is supplied in such form as to be available to the navigator with a fair amount of effort, the vessel is not unseaworthy * * *."

In the Circuit Court of Appeals it was said, page 754:

> "* * * a ship is well found, if she has the proper documents on board, and if when she sails, such of her charts and light lists are corrected as cover the waters she will enter before her officers will have ready opportunity to correct them."

In *The Silvia,* 68 Fed. 230 (C. C. A. 2), aff'd 171 U. S. 462, also cited by petitioners, a steamer sailed from Matanzas for New York having on board a cargo of sugar. One of her compartments, which had been fitted for the carriage of passengers, contained on this voyage only some ropes and gear. There were ports in this compartment fitted with glass covers and also with additional covers of iron. None of the ports in the compartment were closed, otherwise than by the glass covers. Soon after getting out to sea, rough weather was encountered and it was found that the glass cover of one of the ports had been broken and that sea water had entered, damaging the cargo.

The Circuit Court of Appeals said (p. 231):

> "The officers of the vessel regarded the glass covers as strong enough to resist ordinarily heavy seas, and seem to have left the iron covers unclosed intentionally upon the present voyage, in order that the compartment might be light in case it became necessary to visit it. In every other respect, save that when she

> sailed, the iron shutters were not fastened over the ports, the vessel was tight, staunch, and fit for the voyage."

It was held that the ship was not unseaworthy, the Court saying (p. 231):

> "Granting that the glass covers were not a sufficient protection for the ports in rough weather, they were adequate for fair weather, and it would have been but the work of a few moments to unbatten the hatch of the compartment, and close them with the iron covers."

This Court affirmed on the same grounds; see page 465 of 171 U. S.

See, too:

The Mexican Prince, 82 Fed. 484, aff'd on opinion below 91 Fed. 1003, C. C. A. 2.

Jay Wai Nam v. *Anglo-Amer. Oil Co.,* 202 Fed. 822, C. C. A. 9.

The Oritani, 40 F. (2d) 522, aff'd on opinion below 54 F. (2d) 1075, C. C. A. 3.

In all of the above referred to American cases the Harter Act was involved, which subjects the ship to burdens much heavier than does the Canadian Water Carriage of Goods Act which latter Act even abolishes the warranty of seaworthiness (R. 643).

In the American decision of *International Navigation* v. *Farr,* 181 U. S. 218, cited by petitioners, the port not properly fastened was in a cargo compartment and was supposed to be securely closed before the vessel sailed. In a suit under the Harter Act it was held that the vessel was unseaworthy. This Court said (pp. 226, 227):

> *"Nor do we say that the liability rests alone on the ignorance of the officers that the port covers were not securely fastened.* This is not a case where it appears that the port would ordinarily have been left open, to be closed as the exigency might require, and where

> failure to close it during the voyage might be an error or fault in management. * * * *It was neither intended nor expected that they* [the ports] *would require or receive any attention at sea. It was not supposed that any control of them in the course of navigation and management would be necessary,* and no duty to exercise control existed, simply because no need nor occasion for it could have been foreseen or perceived." (Italics ours.)

The above quotation clearly differentiates the case at bar from the decision then made. A chart not to be used for four days after sailing need not be corrected before sailing, but should be corrected during the voyage "as the exigency might require." Charts require "attention at sea" and *"control of them in the course of navigation and management"* is *"necessary"*. There was a duty to exercise "control" of the chart during the voyage, and the failure to exercise such control was neglect in management or navigation.

In such a case the fact that the officers do not know, on sailing, that the chart requires correction is immaterial because there is no duty to exercise "control" (i.e., correct the chart) except during the voyage, and, where the chart is not to be used to navigate by until a later stage of the voyage, there is no duty to examine the chart *before sailing* for the purpose of determining whether it requires correction from the Notices to Mariners.

It will further be noted that this Court held that the question of seaworthiness was one of fact to be decided in view of all the circumstances of the case. In the case at bar, that fact question has been decided in favor of respondent.

Petitioners also cite a "crippled ship" case, *The Elkton,* 49 Fed. (2d) 700, C. C. A. 2, where a steamer's tank top had been damaged and a surveyor recommended that it should not be filled with fuel oil on the voyage. Nevertheless the engineer did fill the tank with fuel oil, resulting in damage to cargo. The decision in favor of the cargo

was based on the ground that the ship was not seaworthy on sailing with the damaged tank top and hence that the Harter Act did not afford a defense. The Court pointed out that the Harter Act gives the owner a "privilege * * * an immunity dependent upon the condition that he use due diligence to make his ship 'in all respects' seaworthy" and said that the ship's unseaworthiness imposed on the shipper an "added risk", which risk "the statute [Harter Act] does not impose upon the shipper" (p. 701):

The Iristo was not an "unseaworthy ship" nor is there any "condition" precedent under the Canadian Act; the decision is consequently not pertinent.

The Elkton, supra, also is inconsistent with the rule stated by Lord Sumner in the House of Lords decision of *Elder, Dempster & Co.* v. *Paterson, supra,* p. 11, where he said that a defect in a ship "structural or accidental" would not constitute unseaworthiness if "in the ordinary course of proper management, the ship so constructed, or the appliance so adjusted, will be restricted to its proper uses and prevented from being a source of danger."

Petitioners also cite *The Maria,* 91 F. (2d) 819. The obvious difference between *The Maria* and the case at bar is that in *The Maria* the chart was not up-to-date *and the master had no Notices to Mariners by the use of which the chart could be corrected.* Petitioners' counsel frankly admitted this distinction in opening the case to the District Court, and, although *The Maria* was cited to the Circuit Court of Appeals, that Court found any discussion of the case unnecessary.

Other American cases cited by petitioners do not call for comment.

(c) The incorrect premises and fallacious theories on which petitioners rely.

Petitioners state, p. 3, "none of the facts are in dispute." On the contrary, the alleged facts and premises on which petitioners base their contentions are vigorously disputed

because they are supported neither by testimony nor by finding. See this brief, pp. 5, 20, 23.

One of petitioners' contentions is that the Iristo was unseaworthy because the master had no "intention" of making use of the Notices to Mariners.

It is the ordinary duty of a master to examine the charts and notices before the charts are actually put into use and within a sufficient time to make any necessary corrections. Captain Stephensen testified that he performed this duty personally, except in specific instances when he delegated it to his chief officer (R. 569), and that he "went through all the charts" relating to the voyage to Bermuda (R. 575). This examination must have been made on the four-day voyage to Bermuda as the master's time at St. John was occupied with other matters (R. 484, 550).

This chart (Ex. X separately reproduced) had been purchased only five days before at St. John from an official sub-agent of the British Admiralty and was presumably corrected up to the date of the latest available Notice to Mariners (*supra*, p. 6), and, if it had been so corrected, no examination of Notices to Mariners was called for. There was nothing on the chart to indicate that it was not up-to-date except for the statement thereon that the latest printed correction had been made in 1932. This was by no means a definite indication that a notice issued in 1936 was omitted because no notices relating to this chart might have been issued since the last correction.*

The chart was again examined at least three hours before the stranding, when it was laid on the chart table at noon on March 15th and the Iristo's course plotted thereon, *supra*, p. 6.

The weather was fine and the Iristo was approaching Bermuda in broad daylight. No real navigational difficulties were to be expected until the Iristo was far beyond North Rock Light. The master no doubt considered the

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* The statement in the petition (p. 10) that the chart "disclosed on its face that it was five years out of date" is untrue.

chart sufficient for his purposes without minute scrutiny, and that would indeed have been the case had it not been for the disastrous and incautious alteration of course just prior to the stranding. Had the master been more cautious, he could easily have consulted the Notices to Mariners procured at Boston, which were at hand in the chart room (R. 613, 717). The very first of these notices, No. 52 of 1936, contained the reference to the "wreck" (R. 741). His failure so to do was an "act, neglect or default * * * in management or navigation."

The master's alleged "intention" on sailing from St. John not to examine the Notices to Mariners, was nonexistent in fact. There was no reason for the master to form any "intention" with respect to a chart which would not be used until four days from St. John.

In *U. S. Steel Products Co.* v. *Amer. & For. Ins. Co., supra,* p. 15, Judge Learned Hand answered the contention that a chart must be checked against the Notices to Mariners before the voyage began, as follows, p. 753: "it need not have been if before the ship reached the waters which the charts and the lists covered they could conveniently be brought up to date; if that was not done, it was due to the negligence of the crew during the voyage, not to faulty equipment, and the ship was not unseaworthy."

The master testified that he did examine the Notices to Mariners, probably after leaving St. John, at R. 575:

> "Q. When did you do that? A. A day or two after I went from St. John or perhaps it was when I was on the way up to St. John or it may have been when I was in Halifax."

After the ship was at sea the master would have ample time (four days) to look through the charts and the Notices to Mariners and he would examine his charts and Notices to Mariners with respect to the several other ports at which he was to call after leaving Bermuda.

In making that examination he presumably, as he testified, "overlooked" the reference to the "wreck" (R. 563), or, if he did see it, may have considered it unimportant and failed to note it, particularly as it was off the ordinary course. A "wreck" which had gone ashore at least three months before could not be considered reliable or important for navigational purposes.

The Circuit Court of Appeals said (R. 755):

> "Doubtless through *inadvertence* he (the master) failed to have chart No. 360 corrected to date after leaving St. John, and relied on No. 360 as it was when approaching Bermuda." (Italics ours.)

This is a finding that it was not lack of *intention,* but an oversight or lack of *attention,* after leaving St. John, that resulted in the chart's not being corrected.

The testimony amply supports the findings (1) that the Iristo was seaworthy; (2) that due diligence was exercised to make her seaworthy; (3) that the loss was due to an "act, neglect or default" in navigation, etc. See findings 32 and 34 (R. 718, 719; *supra,* p. 4).

The Circuit Court of Appeals further pointed out that the master and mates were men "of wide sea experience", that there was "no negligence in the selection of officers", and that the negligence was "not that of the owner" (R. 755).

In the "specifications of error" on which petitioners rely (Brief p. 22; see, too, petition pp. 9, 15) this Court is asked to set aside the concurrent findings below of seaworthiness and due diligence. These "specifications" are:

1. That there was negligence of the officers "before the commencement of the voyage." The short answer to this is that there was no such negligence, negligence being negatived by finding No. 34 (R. 719) that "due diligence had been exercised to make her (the Iristo) seaworthy."

Indeed, in *Steel* v. *State Line, supra,* p. 8, seaworthiness was held to be a question of fact even if there were negli-

gence before sailing. A ship is not unseaworthy "by reason of something objectionable but easily curable by those on board" (quoted from an opinion of the Privy Council, *supra*, p. 10); See, too, *supra*, pp. 9-11.

2. That the Iristo was unseaworthy because "both the defective condition (of the chart) *and the availability of means to correct it* are unknown to the vessel's officers."

Here there is a serious error in a statement of fact. The master and chief officer knew that there were Notices to Mariners on board which could be used to correct the chart (R. 553-555, 613).

The chart was "easily curable by those on board" and hence did not render the ship unseaworthy.

If after a ship puts to sea the master finds a crack in the mirror of his sextant, which defect he is able to remedy in a few seconds by the substitution of a new mirror, that defect surely does not render the ship unseaworthy even if the master believed the sextant to be sound when the ship sailed.

There are a number of other incorrect and misleading statements of fact in the petition and brief, but it seems unnecessary to refer to all of them in detail.

At p. 7 of the petition it is said, "None of the Notices to Mariners was ever examined by the ship's officers to ascertain if they contained any data in relation to Bermuda after they learned that they were to sail there * * *." This is contrary to the testimony of the master (*supra*, p. 21) that he went through the Notices after being notified at Halifax that he was to call at Bermuda.

(d) Petitioners fail to show any sufficient reason for granting a writ of certiorari.

Petitioners list four reasons, petition, p. 17:

(1) That the case at bar is "in conflict with the law as settled in the Fourth, Sixth and Ninth Circuits." No cases under the Canadian Water Carriage of Goods Act have ever been decided in those Circuits. The Fourth Circuit

case is *The Maria, supra,* p. 19, where the master had no Notices to Mariners with which to correct his chart, so that the facts were entirely different from those in the case at bar. Furthermore, the case was governed by the Harter Act, an entirely different statute. In the Sixth Circuit petitioners apparently rely upon a *District Court* decision, *Spencer Kellogg* v. *Great Lakes Transit,* 32 F. Supp. 520, which arose under the *United States Carriage of Goods by Sea Act.* That decision is in no way opposed to the case at bar. The decisions in the Ninth Circuit, which arose under the Harter Act, are also not applicable to, nor opposed to, the case at bar.

Petitioners have cited these cases merely to show that the lower courts should have found the facts differently from what they did find them to be.

2. That "the law in the present case is contrary to the principle of decisions of this Court and of the British House of Lords."

We submit that the lower courts have followed the controlling British decisions in the Privy Council and House of Lords. This Court has never decided a case arising under the Canadian Water Carriage of Goods Act or any like statute. The decision below is in accord with the decisions of this Court in so far as they are applicable.

3. That this Court should "resolve any conflict as to their (the Hague Rules) proper interpretation." If the Court were to adopt this proposal, almost every cargo damage case would have to be passed on by this Court.

4. That "the questions presented are of great commercial importance * * * under this decision a carrier can escape all liability for loss of cargo resulting from insufficiency of navigational equipment of his vessel by leaving the whole matter in the hands of ship's officers."

The decision below does not go so far. All that it holds is that seaworthiness is a question of fact, and that a ship is not unseaworthy, as a matter of law, because the crew fail to perform their duty on the voyage.

The District Court found the ultimate facts of seaworthiness, due diligence, and that the loss was due to an excepted cause. Petitioners seek to upset those findings, admitting that they were concurred in by both courts (petition, p. 3). We submit that there is no question of law for this Court to review.

SECOND POINT

The decision below is also correct on the wholly independent ground that the respondent was not the carrier nor liable under the bills of lading.

It is not appropriate to argue the above question of fact at length. The Court is accordingly referred to the opinion of the District Court (R. 686-698) and findings 1-17 (R. 705-714) and conclusions of law 1, 2, 3 (R. 720). Also to the exceedingly clear and enlightening testimony of Mr. Arthur N. Carter, who was called as respondent's expert as to Canadian law. Mr. Carter, a Master of Arts and Bachelor of Civil Law of Oxford University and a solicitor and barrister of the Supreme Court of New Brunswick, covered the entire subject comprehensively (R. 275-338).

As the libels were correctly dismissed on the ground above referred to, the question as to whether the respondent was also not liable because of the exemptions provided in the Canadian statute is in fact an academic one.

Helvering v. *Gowan,* 302 U. S. 238, 245-6.
J. E. Riley Investment Co. v. *Commissioner,* 311 U. S. 55, 59.

LAST POINT

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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